

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

**JOAN MULLIN, ADMINISTRATRIX OF THE  
ESTATE OF ROBERT MULLIN, deceased and  
JOAN MULLIN, individually,**

**Plaintiffs,**

**v.**

**ADMINISTRATOR KAREN BALICKI, et als.**

**Defendants.**

**CIVIL ACTION**

**Civ. No. 3:11-cv-00247 (MLS-LHG)**

**Return Date: September 15, 2014**

---

**PLAINTIFF'S BRIEF IN SUPPORT OF MOTION TO AMEND THE  
COMPLAINT**

---

**REDACTED VERSION**

**On the Brief:**

**Shelley L. Stangler, Esq.**

**SHELLEY L. STANGLER, PC  
ATTORNEY FOR PLAINTIFF  
155 MORRIS AVENUE, 2<sup>ND</sup> FLOOR  
SPRINGFIELD, NEW JERSEY 07081  
PHONE (973) 379-2500  
FACSIMILE: (973) 379-0031**

**TABLE OF CONTENTS**

THIS TABLE OF CONTENTS AND AUTHORITIES ARE SUBMITTED WITH A REDACTED BRIEF. THE PAGES AND REFERENCES HEREIN MATCH THE UNREDACTED BRIEF SUBMITTED UNDER SEAL

TABLE OF AUTHORITIES.....ii

PRELIMINARY STATEMENT.....1

PERTINIENT FACTS.....3

RELEVANT PROCEDURAL HISTORY.....9

LEGAL ARGUMENT

    POINT I

        THE AMENDMENT MEETS THE PLEADING  
STANDARDS AND SHOULD BE PERMITTED.....13

    POINT II

        PLAINTIFF SHOULD BE PERMITTED TO AMEND  
THE COMPLAINT BASED ON NEW INFORMATION  
PROVIDED TO THE COURT.....17

            A. The issue of diligence, bad faith and  
unjustified delay in the context of this case. ....18

            B. There is no prejudice to the defendants in granting  
the Amendment .....20

            C. The Amendment should be granted to permit  
the case to be resolved on its merits.....21

    POINT III

        THE AMENDMENT RELATES BACK TO THE  
FILING OF THE COMPLAINT.....23

            A. The state’s fictitious defendant impleader  
Rules apply to permit the amendment.....23

            B. The amendment relates back to the filing of

The original complaint.....24

POINT IV

DISMISSAL OR SUMMARY JUDGMENT DOES  
NOT OPERATE TO PRECLUDE AMENDMENT  
OF THE COMPLAINT.....28

CONCLUSION.....29

## TABLE OF AUTHORITIES

### Cases

<u>Adams v. Gould Inc.</u> 739 F.2d 858,868 (3d Cir. 1984).....	22,23,28,29
<u>Angelastro v. Prudential-Bache Sec., Inc.</u> , 764 F.2d 939 (3d Cir. 1985).....	14
<u>Argueta v. United States Immigration</u> , 643 F.3d 60 (3d Cir. 2011).....	16
<u>Arthur v. Maersk, Inc.</u> 434F. 3d 196 (3d Cir. 2006).....	21,22, 25, 27
<u>Ashcroft v. Iqbal</u> , 556 U.S. 662(2009).....	2,14
<u>Bailey v. Sullivan</u> , 885 F.2d 52 (3d Cir. 1989).....	18
<u>Bell Atlantic Corp v. Twombly</u> , 550 U.S. 554 (2007).....	14, 15,16
<u>Billero v. Wachovia Mtg.</u> , 2010 WL 5168949 (D.N.J. 12/14/10-unpublished, copy annexed).....	28
<u>Boileou v Bethlehem Steel Corp.</u> , 730 F. 2d 429 (3d Cir. 184), <i>cert den.</i> , 469 U.S. 871 (1984).....	17, 23
<u>Boykins v. Ambridge Area School District</u> , 621 F.2d 75 (3d Cir. 1980).....	16
<u>Brown v. Kennedy Memorial Hospital</u> , 312 N.J. Super. 579 (App. Div. 1998).....	24
<u>Colburn v. Upper Darby Twp.,(Colburn II)</u> 946 F. 2d 1017 (3d Cir. 1991).....	15,16
<u>Colburn v. Upper Darby Twp., (Colburn I)</u> 838 F. 2d 663 (3d Cir 1988), <i>cert den.</i> , 489 U.S. 1065 (1989), <i>overruled on oth. grnds by</i> <u>Leatherman v. Tarrant County Narcotics &amp; Intelligence Unit</u> , 507 U. S. 163 1993).....	15,17

<u>Cooper v. Shumway,</u> 780 F.2d 27, 29 (10 <sup>th</sup> Cir. 1985).....	28
<u>Derienzo v. Harvard Industries, Inc.,</u> 357 F.3d 348 (3d Cir. 2004).....	23,24
<u>Evancho v. Fisher,</u> 423 F. 3d 347 (3d Cir. 2005).....	16
<u>Farrell v. Votator Div. of Chemetron Corp.,</u> 62 N.J. 111 (1973).....	23,24
<u>Forman v. Davis,</u> 371 U.S. 178 (1962).....	11,19,21,22,23,28
<u>Fowler v. UPMC Shadyside,</u> 578 F.3d 203 (3d Cir. 2009).....	14,15
<u>Glassmand v. Computer Vision Corp.,</u> 90 F.3d 617, 623 (3d Cir. 1990).....	28
<u>Grayson v. Mayview State Hosp.,</u> 293 F.3d 103 (3d Cir. 2002).....	17
<u>Hatzel &amp; Buehler, Inc. v. Southern Systems,</u> 1988 WL 101255 (D.N.J. 1988-unpublished -copy annexed).....	29
<u>In Re Burlington Coat Factory Securities Litigation,</u> 114 F.3d 1410 (3d Cir. 1977).....	18, 28
<u>Jordan v. Fox, Rothschild, O'Brien &amp; Frankel,</u> 20 F.3d 1250 (3d Cir. 1994).....	15
<u>Kost v. Kozakiewicz,</u> 1 F.3d 176 (3d Cir. 1993).....	15
<u>Kolitch v. Lindeahl</u> 100 N.J. 485 (1985).....	16
<u>Krupski v. Costa Crociere,</u> 130 S. Ct. 2385 (2010).....	25
<u>Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,</u> 507 U.S. 163 (1993).....	16,17



<u>Longo v. Santoro,</u> 195 N.J. Super. 507 (1984).....	16
<u>Lorenz v. CSX Corp.</u> 1 F.3d 1406 (3d Cir. 1993).....	21
<u>Lucas v. Morgan</u> 2011 WL 1790114 D. Del. May 9, 2011).....	17
<u>Matynska v. Fried,</u> 175 N.J. 51 (2002).....	24
<u>Mears v. Sandoz Pharmaceuticals,</u> 300 N.J. Super. 622 App. Div. 1997).....	24
<u>M.G. v. Crisfield,</u> 547 F. Supp. 2d 399 (D.N.J. 2008).....	15
<u>O'Dell v. United States Gov't,</u> 256 Fed. Appx. 444 (3d Cir. 2007).....	17
<u>O'Keefe v. Snyder,</u> 83 N.J. 478 (1980).....	24
<u>Phillips v. County of Allegheny,</u> 515 F.3d 224 (3d Cir. 2008).....	14,15
<u>Simmons v. City of Philadelphia.,</u> 947 F.2d 1042 (3d Cir. 1991).....	15
<u>Singletary v. Pennsylvania Department of Corrections,</u> 266 F.3d 180 (3d Cir. 2001).....	26
<u>Shane v. Fauver,</u> 213 F. 3d 113 (3d Cir. 2000).....	17
<u>State Trading Corp. v. Assuranceforeningen Skuld,</u> 921 F.2d 409, 417-418 (2d Cir. 1990).....	28
<u>Stegmeier v. St. Elizabeth Hospital,</u> 239 N.J. Super. 475 (App. Div. 1990).....	24
<u>Stoneking v. Bradford Area School Dist.,</u> 882 F.2d 720 (3d Cir. 1989).....	16

<u>Twohy v. First Nat’l Bank of Chicago,</u> 758 F.2d 1185, 1196 (7 <sup>th</sup> Cir. 1985).....	28
<u>Varlack v. DWL Carribean Inc.,</u> 550 F.2d 171 (3 <sup>rd</sup> Cir. 1977).....	25, 26
<u>Viviano v. CBS,</u> 101 N.J. 538 (1986).....	24
<u>Wilson v. City of Atlantic City,</u> 142 F.R.D. 603 (D.N.J. 1992).....	23
<u>Wilson v. Garcia,</u> 471 U.S. 261 (1985).....	24
<u>Zenith Radio Corp. v. Hazeltine Research,</u> 401 U.S. 321 (1971).....	18
 <u>Statutes</u>	
F.R.C.P. 15(a).....	16,21,13
F.R.C.P. 15(c).....	1,25
F.R.C.P. 12(b)(6).....	14
N.J. Civ. Rule 4:26-4.....	23
 <u>Other Sources</u>	
Federal Rules Handbook, 199, Baiclar, McKee, Janssen, Corr, West Publishing Group at p. 304.....	24

**PRELIMINARY STATEMENT**

Plaintiff seeks to amend the Second Amended Complaint<sup>1</sup> upon permission granted by the District Court by Order dated July 25, 2014, docket entry no. 204 and Opinion dated July 25, 2014, docket entry no. 203. In granting permission to file this motion, the Hon. Mary L. Cooper had denied plaintiff's motion to reconsider the dismissal of all claims other than one (1) claim as to Nurse Byrd. The Court found that the Complaint under review continued to lack the specificity required and that "what plaintiffs truly seek to do is to amend the Second Amended Complaint." The law permits amendment of a complaint upon dismissal or summary judgment where the amendments are not brought in bad faith, are not the product of undue delay, there is no prejudice and the amendment is not futile. Further, the requirements of F.R.C.P. 15 (c) must be met.

Judge Cooper did provide some guidance, and thought it appropriate for plaintiff to distinguish between discovery, or evidence obtained in July 17, 2013, which was available prior to the Court's decision of November 1, 2013, and discovery located and known to plaintiff in February 2014 of which counsel promptly advised the Court (Opinion, p. 11). The Court noted that the Magistrate Judge could, in her discretion, distinguish between the discovery for purposes of this motion.

Insofar as the policies and procedures produced in the July 2013 discovery could not be put into context until the February 2014 discovery was obtained, which establishes that plaintiff was classified as a Mental Health Special Needs Inmate, and because plaintiff counsel did not act

---

<sup>1</sup> The permutations in the identification of four (4) previously filed complaints have been noted in footnote 1 to plaintiff's Brief in Opposition to the States' motion to Dismiss, docket entry no. 147. The Court notes that the Fourth Amended Complaint which was the subject of the motion was improperly designated and is to be referred to as the Second Amended Complaint, docket entry No. 102. Any new amended complaint would be designated a Third Amended Complaint accordingly.